

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 27, 2003

IN RE:

**PETITION OF TENNESSEE AMERICAN
WATER COMPANY TO CHANGE AND
INCREASE CERTAIN RATES AND
CHARGES SO AS TO PERMIT IT TO
EARN A FAIR AND ADEQUATE RATE
OF RETURN ON ITS PROPERTY USED
AND USEFUL IN FURNISHING WATER
SERVICE TO ITS CUSTOMERS**

**DOCKET NO.
03-00118**

ORDER GRANTING MOTION TO STRIKE

This docket came before the Hearing Officer for consideration of the *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein* filed on June 24, 2003 by the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD").

On June 23, 2003, Tennessee American Water Company ("TAWC") filed its pre-filed rebuttal testimony. Included in this filing was the rebuttal testimony of Christopher C. Klein, Ph.D. On June 24, 2003, the CAPD filed its motion to strike the testimony of Dr. Klein. The CAPD argued that the panel should not consider the testimony because TAWC failed to disclose Dr. Klein's name and the nature of his testimony in its response to a discovery request issued by the CAPD on April 30, 2003. Given that Dr. Klein is a former employee of the Tennessee Regulatory Authority, the CAPD asserts that a full investigation of his previous expert assertions

is necessary and that the proximity of the hearing and lack of disclosure has rendered such an investigation “impossible.”¹

On June 25, 2003, Chattanooga Manufacturers Association (“CMA”) filed a response to the motion to strike. CMA did not take a position on the merits of the motion, but requested if the motion were denied that TAWC provide by noon June 27, 2003 copies of Dr. Klein’s previous testimony in any docket involving TAWC.

On June 26, 2003,² TAWC filed its response to the motion to strike and a supplement to its response to the CAPD’s April 30th discovery request. In its response to the motion to strike, TAWC asserts that it had previously disclosed to the CAPD Dr. Klein’s name as a possible rebuttal witness and that it has timely supplemented its discovery response. Also on June 26, 2003, the CAPD filed a reply to TAWC’s response to the motion to strike.

The Tennessee Rules of Civil Procedure address the discovery of expert information.³ Rule 26.02(4)(A)(i) provides:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.⁴

A party must seasonably supplement any responses to such interrogatories.⁵

The crux of the CAPD’s argument is that TAWC failed to seasonably supplement its response to the CAPD’s April 30th discovery request asking TAWC to identify any person it expected to call as an expert witness in the docket and to provide certain information regarding

¹ *Attorney General’s Motion to Strike and Exclude the Testimony of Chris Klein*, 5 (Jun. 24, 2003).

² On June 24, 2003, the Hearing Officer issued a *Notice of Filing* directing that all responses be filed by noon June 26, 2003.

³ Pursuant to the Authority’s rules, discovery in contested cases is effectuated in accordance with the Tennessee Rules of Civil Procedure. Tenn. R. & Regs. 1220-1-2-.11(1) (Rev. Mar. 2002).

⁴ Tenn. R. Civ. P. 26.02(4)(A)(i) (Vol. 1 2003); *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 698 (Tenn. 1998).

⁵ Tenn. R. Civ. P. 26.05(1) (Vol. 1 2003); *Lyle*, 746 S.W.2d at 698.

the expert's credentials and opinions. TAWC asserts that it timely notified the CAPD that it would call Dr. Klein as a witness through the following three actions: 1) advising a member of the CAPD's staff that it may call Dr. Klein as a rebuttal witness depending on the contents of the Intervenor's pre-filed direct testimony; 2) filing the pre-filed rebuttal testimony of Dr. Klein on the date it was due; and 3) supplementing its response to the CAPD's April 30th discovery request on June 26, 2003.⁶

The Hearing Officer finds that under the circumstances of this case TAWC did not seasonably supplement its discovery response. Regardless of what TAWC may have told an unnamed member of the CAPD's staff,⁷ TAWC did not properly supplement its discovery until June 26, 2003, four calendar days prior to the hearing and three calendar days following the filing of Dr. Klein's pre-filed rebuttal testimony.⁸ It is reasonable to expect that TAWC would have, at the very latest point in time, supplemented its response at the time it filed Dr. Klein's pre-filed rebuttal testimony and certainly before the failure to do so was raised in the CAPD's motion to strike.

Moreover, TAWC did not contact Dr. Klein until two weeks after the filing of Intervenor's pre-filed direct testimony and did not decide to call Dr. Klein as a witness until June 19 or 20, 2003⁹ even though it had received Intervenor's direct testimony on May 30, 2003 and

⁶ *Tennessee American Water Company's Response to Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 2-3 (Jun. 26, 2003).

⁷ The rules of the Tennessee Regulatory Authority require that responses to interrogatories be signed under oath and that the original be served on the requesting party and copies served on other parties. Tenn. R. & Regs. 1220-1-2-.11(5)(b), (6) (Rev. Mar. 2002).

⁸ See *Miller v. Nashboro Record Co.*, 1989 WL 45789, *4 (Tenn. Ct. App. May 3, 1989) (finding that under the circumstances of the case, a supplement made five days prior to the hearing was not timely). The completeness of TAWC's supplement is also of concern. The CAPD asked that TAWC "identify any matter in which the expert has testified (through deposition or otherwise)." TAWC's Supplement to Discovery Responses, 1 (Jun. 26, 2003). TAWC responded by listing one docket involving TAWC and stating that Dr. Klein did not have a list of any others. *Id.* at 2.

⁹ *Tennessee American Water Company's Response to Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 2 (Jun. 26, 2003).

rebuttal testimony was due June 23, 2003. As will be described further below, the procedural schedule in this case was designed to resolve this docket within approximately six months of the filing of TAWC's tariff; therefore, the dates set forth in the schedule, particularly the hearing dates, are difficult to alter. Given the constrained procedural schedule, it is unseasonable for TAWC to notify the CAPD of TAWC's expected expert witness four days before the hearing. Moreover, this action seems even more egregious when one realizes that two-thirds of the time for filing rebuttal testimony had passed before TAWC asked Dr. Klein to prepare rebuttal testimony for TAWC's consideration.

Having determined that TAWC failed to seasonably supplement its response to the CAPD's April 30th discovery request, the controversy now centers on the ramifications of that failure. The Tennessee Supreme Court has held that trial judges may take corrective action when a party fails to seasonably supplement a discovery request.¹⁰ The Court has held that such corrective action may include excluding the testimony or, when the failure is not knowing or deliberate, other sanctions may be appropriate.¹¹ "In determining the appropriate sanction the trial judge should consider:

1. The explanation given for the failure to name the witness.
2. The importance of the testimony of the witness;
3. The need for time to prepare to meet the testimony; and
4. The possibility of a continuance."¹²

In this case, the CAPD did not explicitly allege that TAWC knowingly or deliberately failed to seasonably supplement its discovery response; therefore, the Hearing Officer will

¹⁰ *Lyle*, 746 S.W.2d at 699 (citing *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981)).

¹¹ *Id.* Other sanctions include excluding the testimony as well as permitting the witness to testify or granting a continuance. *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981).

¹² *Id.*

consider the four factors listed above.¹³ Given its assertion that the supplement was timely, TAWC does not specifically provide an explanation for failing to timely notify CAPD of the expert testimony. TAWC does, however, when asserting the timeliness of its supplementation, assert that it did not decide to use Dr. Klein as an expert witness until either June 19 or 20, 2003.¹⁴ This explanation is insufficient to explain why TAWC did not properly supplement its response prior to the filing of the testimony or before June 26, 2003.

As described by TAWC, Dr. Klein “will address the rates to be charged to the City of Chattanooga for fire hydrants and public fire protection.”¹⁵ This same issue is addressed by TAWC in the pre-filed direct testimony of Michael A. Miller,¹⁶ the pre-filed direct and rebuttal testimony of Paul R. Herbert,¹⁷ and the rebuttal testimony of Paul R. Moul.¹⁸ TAWC fails to explain in its response why the testimony of Dr. Klein is necessary when it already has available to it three other witnesses on the subject, the names of which have been timely provided to the CAPD. TAWC did not even mention in its response the case of *Strickland v. Strickland*, which the CAPD cited and which lists the importance of the testimony as a consideration when determining sanctions for failing to timely supplement discovery.¹⁹

¹³ See *Galligan v. Galligan*, 2002 WL 773059, *9 (Tenn. Ct. App. Oct. 21, 2002) (finding that the trial court should have applied the four factors from *Lyle* when the movant did not suggest a knowing or deliberate failure to supplement).

¹⁴ *Tennessee American Water Company's Response to Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 2 (Jun. 26, 2003).

¹⁵ TAWC's Supplement to Discovery Responses, 1 (Jun. 26, 2003).

¹⁶ Michael A. Miller, Pre-Filed Direct Testimony, pp. 3-15 (Feb. 7, 2003), Pre-Filed Rebuttal Testimony, pp. 2-28 (Jun. 23, 2003). Mr. Miller is the Vice President and Treasurer/Comptroller of TAWC. Michael A. Miller, Pre-Filed Direct Testimony, p. 1 (Feb. 7, 2003).

¹⁷ Paul R. Herbert, Pre-Filed Direct Testimony, p. 11 and Cost of Service Allocation Study (Feb. 7, 2003), Pre-Filed Rebuttal Testimony, pp. 1-3 (Jun. 23, 2003). TAWC describes Mr. Herbert as an “Expert in the areas of Cost of Service Allocation and Customer Rate Design.” TAWC's Responses to CAPD's 2nd Round of Discovery, Tab 1 (May 9, 2003).

¹⁸ Paul R. Moul, Pre-Filed Rebuttal Testimony, pp. 25-26 (Jun. 23, 2003). TAWC describes Mr. Moul as an “Expert in the area of Cost of Equity.” TAWC's Responses to CAPD's 2nd Round of Discovery, Tab 1 (May 9, 2003).

¹⁹ *Strickland*, 618 S.W.2d at 501 (cited by the Tennessee Supreme Court at *Lyle*, 746 S.W.2d at 699).

CAPD explains that a full investigation into Dr. Klein's previous expert assertions is necessary, particularly in light of Dr. Klein's past employment with the Tennessee Regulatory Authority.²⁰ CAPD further asserts that use of the testimony would deprive it of the right to a fair hearing.²¹ Additionally, although CMA did not take a position on the motion, it did mention that the other parties would need to prepare to cross-examine Dr. Klein.²² Certainly, parties should be afforded a reasonable opportunity to investigate the opinions of an expert before being required to cross-examine the expert. The CAPD asserts that it will not be afforded such an opportunity if the testimony is considered at the hearing scheduled to begin June 30, 2003. Based on the facts presented here, the Hearing Officer finds that the CAPD's assertion is accurate. This finding is a natural result of the determination that the supplement was not seasonable as well as the fact that the information provided in the supplement is inadequate.²³

The final consideration is the possibility of a continuance. Rate cases such as this are governed by Tennessee Code Annotated Section 65-5-203. This section directs the Authority to complete its investigation within nine months of the filing of the rate increase, but permits the company seeking a rate increase to place the rates into effect if the investigation has not been concluded at the end of six months.²⁴ Although the Authority may require the company to file a bond if it chooses to place the rate increase into effect, the preference is that the case be concluded within six months to avoid the possibility of multiple adjustments to rates. In this

²⁰ *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 5 (Jun. 24, 2003).

²¹ *Id.* at 1.

²² *Chattanooga Manufacturers Association Response to the Attorney General's Motion to Strike*, 1 (Jun. 25, 2003).

²³ See *supra* note 8. The CAPD asked that TAWC "identify **all** publications written or presentations presented in whole or in part by the witness." TAWC's Supplement to Discovery Responses, 1 (Jun. 26, 2003). TAWC responded by referring to Dr. Klein's rebuttal testimony. *Id.* at 2. In his rebuttal testimony, Dr. Klein states: "More than 30 of my articles have appeared in in [sic] professional or academic journals and I have made more than 50 presentations at professional meetings." Christopher C. Klein, Pre-Filed Rebuttal Testimony, p. 2 (Jun. 23, 2003). No further citations were provided.

²⁴ Tenn. Code Ann. § 65-5-203(a), (b) (Supp. 2002).

case, the proposed rate increase was filed on February 7, 2003; therefore, the six-month period expires on August 7, 2003. Given that the panel members may wish to receive post-hearing briefs, require a certain amount of time to prepare for deliberations, and conduct other calendared activities, moving the hearing date at this time, is likely to extend deliberations well beyond August 7, 2003 and possibly beyond the nine-month deadline of November 7, 2003.²⁵

Based on the above discussion of the four factors set forth by the Tennessee Supreme Court, the Hearing Officer concludes that the most appropriate sanction under the circumstances of this case is to grant the motion to strike the testimony of Dr. Klein.²⁶

IT IS THEREFORE ORDERED THAT:

1) The *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein* filed on June 24, 2003 by the Consumer Advocate and Protection Division of the Office of the Attorney General is granted. The testimony of Christopher C. Klein shall be stricken from the record and shall not be considered in the deliberations of the issues in this docket.

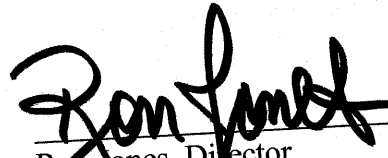
²⁵ The constraints imposed by Section 65-5-203 were previously recognized in an order entered in this docket that stated:

The Pre-Hearing Officer finds that the above procedural schedule should be slightly modified for the following reasons. . . . Second, the hearing dates of July 8 and 9, 2003 conflict with potential organizational commitments of the Authority and its directors insofar as those dates inhibit sufficient opportunity by the panel assigned to this docket to consult with advisory staff and deliberate the merits of all issues without unnecessarily extending adjudication of this proceeding beyond the six month time frame.

Order on March 12, 2003 Status Conference, 3-4 (Mar. 17, 2003).

²⁶ In the event this order is appealed to the panel, the Hearing Officer notes that if this decision is not supported by a majority of the panel, it seems that basic fairness would require the Authority to: 1) continue the hearing to permit the CAPD and other intervenors a reasonable opportunity to prepare for the cross-examination of Dr. Klein and 2) obtain TAWC's agreement to not place the rate increase into effect until the Authority enters a final order in this docket.

2) Any appeal of this *Order Granting Motion to Strike* shall be considered by the panel assigned to this docket immediately preceding the opening remarks of the parties.



Ron Jones, Director
Hearing Officer²⁷

²⁷ See *Order Suspending Increase in Rates for Ninety Days and Appointing a Pre-Hearing Officer*, 2 (Mar. 31, 2003) (appointing Director Jones to “hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion”).